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U.S. Department of Homeland Security

Citizenship and Immigration Services

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

[redacted]

ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, 3/F
425 I Street, N.W.
Washington, DC 20536

File: WAC 02 191 53780 Office: CALIFORNIA SERVICE CENTER Date: FEB 02 2004

IN RE: Petitioner:
Beneficiary: [redacted]

Petition: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER: [redacted]

PUBLIC COPY

INSTRUCTIONS:
This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of Citizenship and Immigration Services (CIS) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of $110 as required under 8 C.F.R. § 103.7.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be sustained.

The petitioner is a garment manufacturer. It seeks to employ the beneficiary permanently in the United States as a production supervisor. As required by statute, the petition is accompanied by a Form ETA 750 Application for Alien Employment Certification approved by the Department of Labor. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition.

On appeal, counsel submits a brief and additional evidence.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

8 C.F.R. § 204.5(g)(2) states, in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

Eligibility in this matter hinges on the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the Form ETA 750 was accepted on April 30, 2001. The proffered wage as stated on the Form ETA 750 is $3,200 per month, which equals $38,400 per year.

With the petition counsel submitted the petitioner's fiscal year 2000 Form 1120 U.S. Corporation Income Tax Return. The fiscal year which that return covers ran from July 1, 2000 to June 30, 2001. During that fiscal year, the petitioner declared taxable

income before net operating loss deduction and special deductions of $23,586. At the end of that fiscal year, the petitioner had current assets of $380,286 and current liabilities of 360,062, which yields net current assets of $20,224.

Counsel also submitted the petitioner's financial statements for December 31, 2001. The accountant's report that accompanied those financial statements makes clear that they were produced pursuant to a compilation rather than an audit. The report also makes clear that the data contained in the financial statements are based on representations of management, and that the accountant merely compiled management's representations into a standard format. The representations of management are insufficient to demonstrate the ability to pay the proffered wage.

8 C.F.R. § 204.5(g)(2) makes clear that three types of documentation are competent to demonstrate the petitioner's ability to pay the proffered wage. Those three types of evidence are copies of annual reports, federal tax returns, and audited financial statements. The unaudited financial statements submitted by counsel will not be considered.

Counsel also provided the petitioner's California Form DE-6 Quarterly Wage Reports for all four quarters of 2000 and the first quarter of 2001. Those reports were presumably submitted to prove the ability of the petitioner to pay the beneficiary's wages, but are insufficient because they do not show that the petitioner employed the beneficiary during that period.

Finally, counsel provided the first pages of the petitioner's checking account statements for January, February, and March of 2002.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the California Service Center, on August 15, 2002, requested additional evidence.

The Service Center requested that the petitioner demonstrate its continuing ability to pay the proffered wage beginning on the priority date. The Service Center stipulated that, consistent with 8 C.F.R. § 204.5(g)(2), the evidence should consist of copies of annual reports, federal tax returns, or audited financial statements. The Service Center stated that the evidence should cover "Tax Year 2001 to the present."

In response, counsel submitted the petitioner's Fiscal Year 2001 tax return covering the period from July 1, 2001 to June 30, 2002. Counsel cited the total assets, compensation of officers, salary and wage expense, and Schedule A labor expense as evidence of the petitioner's ability to pay the proffered wage.

The FY 2001 return shows that the petitioner declared taxable income before net operating loss deduction and special deductions of $24,211 during that year. At the end of that fiscal year, the petitioner had current assets of $659,325 and current liabilities of $524,464, which yields net current assets of $134,861.

The director found that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on February 11, 2003, denied the petition.

On appeal, counsel cites the petitioner's gross receipts, total assets, accounts receivable, cash, and inventory as evidence of the petitioner's ability to pay the proffered wage. Counsel also notes the increase in those figures from 2000 to 2001, and the decline in accounts payable during the same period, as additional evidence of that ability.

Further, counsel submits copies of the first pages of the petitioner's checking account statements from March 2001 through March 2002. Counsel cites the average balances shown on those statements as evidence of the petitioner's ability to pay the proffered wage.

Counsel argues that merely referring to the taxable income on the petitioner's returns is insufficient to determine the petitioner's ability to pay the proffered wage. Counsel notes that a petitioner's taxable income, under various circumstances, may not accurately reflect a petitioner's ability to pay the proffered wage. Counsel notes that the petitioner, like other taxpayers, reduces that figure as much as possible consistent with tax law.

Counsel notes that a company with considerable assets might, during a given year, show a loss. In such an instance, counsel observes, the taxable income before net operating loss deduction and special deductions would not show the ability to pay the proffered wage, although the company would be solvent and in good financial health.

Counsel notes that a company with a large taxable income before net operating loss deduction and special deductions might have had large losses during previous years. Those losses would be shown as net operating loss deductions and reduce the petitioner's taxable income. Counsel observes that in such a case, the petitioner's taxable income would not indicate the petitioner's manifest ability to pay the proffered wage.

Counsel further notes that companies claim large depreciation deductions although those deductions do not represent the current use of cash. These have the effect of lowering the companies'

taxable income before net operating loss deduction and special deductions such that it does not accurately reflect the companies' cash position during that year.

Finally, counsel notes that in a given instance, a company might already be employing the beneficiary and paying him the proffered wage. In such a situation, counsel correctly argues, the petitioner would have demonstrated its ability to pay the proffered wage, without reference to its taxable income before net operating loss deduction and special deductions or taxable income.

Counsel cites *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), apparently for the proposition that the petitioner's taxable income before net operating loss deduction and special deductions may be disregarded in determining its ability to pay the proffered wage. Counsel concludes that the petitioner is growing and financially sound.

With the brief, counsel provides a letter, dated March 31, 2003, from the petitioner's accountant. In that letter, the accountant cites the petitioner's gross receipts and current assets as evidence of its ability to pay the proffered wage.

The accountant further states that he believes net income is a poor indicator of a company's ability to pay a proffered wage because it is reduced by the company's depreciation deduction, which is not current cash expense. The accountant also noted that a company could increase the profit it reports by capitalizing expenditure items. The accountant concluded that he believes the petitioner is able to pay the proffered wage. Counsel argues that this opinion should be valuable in assisting this office in determining the petitioner's ability to pay the proffered wage.

Counsel and the petitioner's accountant have made various arguments pertinent to the petitioner's ability to pay the proffered wage, both in response to the Request for Evidence and on appeal. They are addressed below.

The petitioner's accountant stated that a petitioner's taxable income might not be an accurate index of its ability to pay a proffered wage because the petitioner may misrepresent as depreciable expenses that would correctly be expensed. Counsel notes that Enron and WorldCom were guilty of that practice. In that event, the petitioner's taxable income would be shown as higher than it would be if correctly computed.

Counsel is correct that a petitioner might misrepresent the nature of its expenditures. Any figure on any document might be falsified. However, the accountant's hypothetical has no relevance to the instant case.

Counsel and the accountant cite the petitioner's gross receipts, total assets, accounts receivable, cash, compensation of officers, salary and wage expense, and Schedule A labor expense as evidence of the petitioner's ability to pay the proffered wage. Their reliance on those figures is inapposite. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Showing that the petitioner paid wages in excess of the proffered wage is insufficient. Showing that the amount of any expense was greater than the amount of the proffered wage is insufficient. Unless the petitioner can show that hiring the beneficiary would somehow have reduced its expenses[1] or otherwise increased its net income[2], the petitioner is obliged to show the ability to pay the proffered wage **in addition to** the expenses it actually paid during a given year. The petitioner is obliged to show that the remainder after all expenses were paid was sufficient to pay the proffered wage. That remainder is the petitioner's ordinary income.

Reliance on the petitioner's total assets is similarly misguided. A petitioner's total assets may include real estate and other long-term assets. Those assets are illiquid and not available to pay a proffered wage. Only the petitioner's current assets may be considered, because they are reasonably expected to be converted to cash or cash equivalents within one year. Further, the petitioner's total current assets alone are not an index of the petitioner's ability to pay the proffered wage. To demonstrate the amount that the petitioner could have contributed out of its current assets, the amount of the current assets must be reduced by the amount of the petitioner's current liabilities to yield the petitioner's net current assets. The petitioner's net current assets may be considered in the determination of the petitioner's ability to pay the proffered wage.

Counsel's reliance on the petitioner's checking account balances is, again, misplaced. First, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Second, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax returns. Third, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), which are preferred evidence of a petitioner's ability to pay a proffered wage.

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[1] The petitioner might demonstrate this, for instance, by showing that the petitioner would replace a specific named employee, whose wages would then be available to pay the proffered wage.

[2] The petitioner might be able to demonstrate that hiring the beneficiary would contribute more to its receipts than the amount of the proffered wage.

Counsel and the accountant have both listed circumstances pursuant to which a petitioner's net income might not be an accurate index of its ability to pay a wage.

Counsel notes that a petitioner may have insufficient net income to pay the proffered wage, but may have sufficient assets for that purpose. For the reasons noted above, this office will consider the petitioner's net current assets and decline to consider its other assets.

Counsel notes that net loss deductions may reduce a petitioner's taxable income, although they are not a current expense. This office agrees with counsel's assessment, and will use the petitioner's taxable income before net operating loss deduction and special deductions as the net income figure with which to determine the petitioner's ability to pay a proffered wage.

Counsel observes that a petitioner might already employ a beneficiary and be paying him the proffered wage. The petitioner would thereby have shown the ability to pay the proffered wage, but that ability would not be reflected in its net income. This office agrees with counsel's assertion, but notes that no evidence in the record indicates that the petitioner has paid any wages to the beneficiary.

Counsel cites *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), for the proposition that this office should disregard the fact that the petitioner's net income is less than the proffered wage. *Sonegawa*, however, relates to petitions filed during uncharacteristically unprofitable or difficult years but only within a framework of profitable or successful years. The petitioning entity in *Sonegawa* had been in business for over 11 years. During the year in which the petition was filed in that case the petitioner changed business locations and paid rent on both the old and new locations for five months. The petitioner suffered large moving costs and a period of time during which the petitioner was unable to do regular business.

In *Sonegawa*, the Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in Time and Look magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturière.

Counsel is correct that, if the petitioner's low profits during

the salient years are uncharacteristic, occurred within a framework of profitable or successful years, and are unlikely to recur, then those losses might be overlooked in determining ability to pay the proffered wage. Here, no evidence has been submitted to show that the petitioner has ever posted a large profit. Assuming that the petitioner's business will flourish, with or without hiring the beneficiary, is speculative.

Counsel cites eleven non-precedent decisions of this office, the facts of which he asserts are similar to the facts of the instant case. Although 8 C.F.R. § 103.3(c) provides that CIS precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding. Counsel's citation of a non-precedent decision is of no effect. Counsel further cites a decision of the Board of Alien Labor Certification Appeals. That decision is also not binding on this office.

Counsel and the accountant both seem to imply that a petitioner's depreciation deduction should be considered a fund available to pay the proffered wage. They are correct that a depreciation deduction does not represent a specific cash expenditure during the year claimed. It is a systematic allocation of the cost of a long-term asset. It may be taken to represent the diminution in value of buildings and equipment, or to represent the accumulation of funds necessary to replace perishable equipment and buildings. The value lost as equipment and buildings deteriorate is an actual expense of doing business, whether it is spread over more years or concentrated into fewer.

While the expense does not require or represent the current use of cash, neither is it available to pay wages. No precedent exists that would allow the petitioner to add its depreciation deduction to the amount available to pay the proffered wage. *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532, 537 (N.D. Texas 1989). *See also Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049, 1054 (S.D.N.Y 1986). The petitioner's election of accounting and depreciation methods accords a specific amount of depreciation expense to each given year. The petitioner may not now shift that expense to some other year as convenient to its present purpose, nor treat it as a fund available to pay the proffered wage.

In calculating the petitioner's ability to pay the proffered wage, CIS will first examine the net income[3] reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by both CIS and judicial

[3] In this case, the petitioner's taxable income before net operating loss deduction and special deductions.

precedent. *Elatos Restaurant Corp. v. Sava, Supra at* 1054 (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman,* 736 F.2d 1305 (9th Cir. 1984); see also *Chi-Feng Chang, Supra at* 532; *K.C.P. Food Co., Inc. v. Sava,* 623 F.Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer,* 539 F.Supp. 647 (N.D. Ill. 1982), *Aff'd,* 703 F.2d 571 (7th Cir. 1983). In *K.C.P. Food Co., Inc. v. Sava,* the court held that the INS, now CIS, had properly relied upon the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. *Supra.* at 1084. The court specifically rejected the argument that the INS should have considered income before expenses were paid rather than net income.

The priority date is April 30, 2001. The proffered wage is $38,400 per year. The petitioner's fiscal year runs from July 1 of the nominal year to June 30 of the next year. As such, the two months immediately following the priority date fell at the end of the petitioner's FY 2000. The petitioner is not obliged to demonstrate the ability to pay the entire proffered wage during FY 2000, but only that portion which would have been due if it had hired the petitioner on the priority date. On the priority date, ten months of that year had elapsed. The petitioner is obliged to demonstrate the ability to pay the proffered wage during the remaining two months. The proffered wage multiplied by one-sixth equals $6,400, which is the amount the petitioner must show the ability to pay during FY 2000.

During FY 2000 the petitioner declared taxable income before net operating loss deduction and special deductions of $23,586. The petitioner ended that fiscal year with net current assets of $20,224. The petitioner has shown the ability to pay the salient portion of the proffered wage during its FY 2000.

During FY 2001, the petitioner is obliged to demonstrate the ability to pay the entire proffered wage. During that year, the petitioner declared taxable income before net operating loss deduction and special deductions of $24,211. That amount is insufficient to pay the proffered wage. The petitioner ended that year, however, with net current assets of $134,861. The petitioner has demonstrated the ability to pay the proffered wage during 2001 out of its net current assets.

No information pertinent to subsequent fiscal years was requested or provided. The petitioner has demonstrated the ability to pay the proffered wage during all salient years.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has met that burden.

ORDER: The appeal is sustained.